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90-1051

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

CAPTAIN J.P. TRISTANI, et al,

Petitioners,

Vs.

EASTERN AIR LINES, INC. et al,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1.

Whether the post-petition status of the claims underlying this case require a core designation pursuant to 28 U.S.C. §157 even though the claims could exist independent of the Chapter 11 bankruptcy proceedings and are based solely on state law and on federal statutes other than the bankruptcy statute.

2.

Whether parties are entitled to a jury trial in an Article III court when their claims are based on a tort injury and a breach of contract arising from state law and upon the Federal RICO Statute (Chapter 18 U.S.C.) and upon 1983 Discrimination Statute (42 U.S.C. §1983), all of which are independent of the Chapter 11 Bankruptcy Statute (Chapter 11 U.S.C.).

3.

Whether Eastern Air Lines should be required to fund the unfunded $281,540,000 of the pilots pension plan guaranteed by the Pension Benefits Guaranty Corporation.

4.

Whether Eleventh Circuit and/or Atlanta District Court has the authority to order the New York District Court to hear the appeal and/or try this case.

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The U.S. District Court for the Southern District of New York has issued no orders as of December 26, 1990.

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The opinion of the United States Court of Appeals for the

Eleventh Circuit, which is set forth in the Appendix, vacated all of the Orders issued by the U.S. District Court for the Northern District of Georgia, Atlanta Division. Both opinions are unreported. (In response to Rule 14(d) of this Court.)

The grounds on which jurisdiction of this Court is envoked are the divergents of opinions of the 2nd, 8th, 10th and 11th Circuits. (Rule 14 (e).

The date of the entry of the judgment of the Eleventh Circuit is November 20, 1990. (Rule 14 (e) (i)).

The jurisdiction of this Court to review the order of the U.S. Court of Appeals for the Eleventh Circuit is envoked under 28 U.S.C. §1254(11). Rule 14 (e) (iv)).

STATEMENT OF CASE

The Petitioners (hereinafter "Tristani") alleged causes of action based upon:

(a) A personal injury tort (the intentional infliction of mental distress);

(b) Breach of a contract between Tristani and Eastern;

(c) Racketeering activity under Federal RICO Statute;

(d) Violation of Section 1983 Discrimination Statute;

(e) Violation of fiduciary duties regarding the pilots pension plans. The original complaint sought damages arising out of all causes of action and demanded a jury trial.

Eastern filed an Adversary Proceeding in its Chapter 11 Bankruptcy case in the New York Bankruptcy Court. The Bankruptcy Court envoked the automatic stay provision under 11 U.S.C. 157 and issued an injunction against further prosecution of the complaint in the Atlanta District Court.

Responding to an order of the Atlanta District Court, Eastern filed a moton to dismiss with brief; Tristani filed a brief; and the District Court granted the motion to dismiss on August 31, 1990. Tristani filed a notice of appeal to the Eleventh Circuit and a request to expedite which was granted. Oral argument before the Eleventh Circuit was on November 14, 1990 and the Eleventh

Circuit issued its opinion on November 20, 1990 by which it ordered the case transferred to the U.S. District Court for the Southern District of New York.

On December 3, 1990 Tristani filed a timely motion for rehearing, which is pending. Tristani filed this petition for Certiorari in December, 1990.

Tristani sought monetary damages, resulting from all alleged causes of action, against Eastern Air Lines, Inc., Texas Air Corporation, Jet Capital Corporation and Frank Lorenzo. Tristani also sought judgment against Eastern, Texas Air, Jet Capital and Lorenzo for the unfunded portion of the Pilot's Pension Plans, known as the A Plan and B Plan in the total amount of $283,540,000. Eastern

deducted from the payroll of Tristani as much as 10% of each payroll check for the purpose of depositing said deduction in the pension plan as Tristani's contribution to that Pension Plan. However Eastern converted these deductions and used them for operating expenses and never deposited Tristani's money in the Plans. Tristani's deductions are part of the $283,540,000.

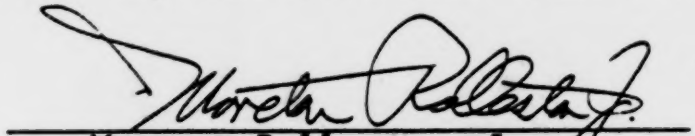
The District Court had jurisdiction of this action under 18 U.S.C. §1961 (1) (B), and §1962 (a), (b), (c) and (d) (RICO); 42 U.S.C. §1983 (Deprivation of Rights); 28 U.S.C. §1331 (Federal Question); 45 U.S.C., sub-chapter I (Railway Labor Act) and 28 U.S.C. §1332 (Diversity of Citizenship).

(Rule 14 (i)).

This writ should be allowed because the divergence of opinions in various circuits on whether or not a Bankruptcy Court can conduct a jury trial. The Eighth and Tenth Circuits have held that Bankruptcy Courts can not conduct jury trials, even in core proceedings. See In re United Missouri Bank of Kansas City, n.a. 901 F2d 1449 (8th Cir.1990). In re Kaiser Steel Corp., No. 90-1013 (10th Cir.Aug 10,1990) 911 F2d 380, p. 389 The Second Circuit held just the opposite, that is, that a Bankruptcy Court could conduct a jury trial in a core proceeding. See In re Ben Cooper, Inc., et al vs. The Insurance Co. of the State of Pennsylvania, et al, 896 F2d 1394.

This Court granted certiorari to the Second Circuit and on November 13, 1990 remanded the case to the Second Circuit to determine jurisdiction. See The Insurance Company of the State of Pennsylvania and Kerwick & Curran, Inc. , v. Ben Cooper, Inc., Case No. 89-1784.

The Eleventh Circuit agreed with the Second Circuit that a Bankruptcy Court could conduct a jury trial but on June 23, 1989 this Court reversed the Eleventh Circuit in Granfianciera, S.A. et al v. Nordberg, Creditor Trustee For The Estate of Chase & Sanborn Corp., fka, General Coffee Corp. (Case No. 87-1616) 109 Supreme Court 2782 (June 23, 1989).



Moreton Rolleston, Jr.
Ga. State Bar No. 613700
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APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No.90-8901

D.C. Docket No. 1:90-cv-318-JTC

CAPTAIN J.P. TRISTANI, et al,

Plaintiffs-Appellants,

versus

EASTERN AIR LINES, INC., et al,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Georgia

(November 20, 1990)

Before TJOFLAT, Chief Judge, DUBINA, Circuit Judge, and Peck*, Senior Circuit Judge.

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*Honorable John W. Peck, Senior U.S. Circuit Judge for the 6th Circuit, sitting by designation.

PER CURIAM:

The issues in this case are presently being litigated in the United States District Court for the Southern District of New York in a Chapter 11 bankruptcy proceeding involving Eastern Air Lines, Inc. The court below, acting on its own initiative, should have transferred this case to that court pursuant to 28 U.S.C. §1404 (a), since the interest of justice and the convenience of the parties require that the case be disposed of in that forum. Accordingly, we vacate the district court's final judgment, and, as well, all orders entered in the case subsequent to the filing of appellants' complaint, and direct the district corut, on receipt of our mandate--which we direct the clerk to issue instanter, to transfer this case to the United

States District Court for the

Southern District of New York.

IT IS SO ORDERED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Captain J.P. Tristani, et al, Plaintiffs,	:	Civil Action File No. 1:90-CV-319-JTC
vs.	:	
Eastern Air Lines, Inc. et al, Defendants.	:	

ORDER

This matter is before the Court on Defendants' Motion to Dismiss; plaintiffs' Motion to certify the case as a class action; plaintiffs' Motion for Default Judgment; Plaintiffs, Motion for Partial Summary Judgment; and defendants' Motion to Extend the Time to Answer the Motion by Plaintiff for Partial Summary Judgment. For the following reasons, defendants' Motion to Dismiss is GRANTED; Plaintiffs' Motion to Certify a Class Action is MOOT; Plaintiffs' Motion for a Default Judgment is MOOT;

Plaintiffs' Motion for Partial Summary Judgment is MOOT; Defendants' Motion to Extend the Time to Answer the Motion by plaintiff for Partial Summary Jdugment is MOOT.

I. BACKGROUND

This action arises from a strike by Eastern Air Lines Pilots and the subsequent bankruptcy of Eastern Airlines. Plaintffs were employed as pilots for Eastern Airlines. Plaintiffs assert five causes of action against defendants.

First, plaintiffs assert a breach of contract action, based upon the collective bargaining agreement between the Air Line Pilots Association ("ALPA") and Eastern Air Lines. Under this contract, plaintiffs contend they

had the right to perform pilot services for Eastern until age 60.

Second, plaintiffs assert a tort action, based on intentional infliction of emotional distress for Eastern's alleged deliberate intention to inflict injury upon the plaintffs by refusing to accept the pilots back for employment after the strike.

Third, plaintiffs allege Eastern violated the Federal RICO stature, 18 U.S.C. §664, §1961, §1962 and §1341, by converting money from the "B Plan" (a pension plan that contained pay dedictions from these plaintiffs) to use for operations.

Fourth, plaintiffs allege Eastern violated 42 U.S.C. §1983 by discriminating against plaintiffs

because of their union membership in rehiring decisions following the sympathy strike.

Finally, plaintiffs contend Eastern breached its fiduciary duty as trustee of the pension plan by converting deducted payroll funds to its own use, thereby deliberately underfunding the B Plan.

On March 9, 1990, defendants filed a voluntary petition for relief under Chapter 11, Title 11 of the Bankruptcy Code. Since that time, Eastern has continued to operate its business and property as debtors-in -possession pursuant to §§1107(a) and 1108 of the Code. On February 12, 1990 plaintiffs filed this action. On March 14, 1990, the Honorable

Burton R. Lifland, Chief Bankruptcy Judge, issued an order finding that this action violated the automatic stay provision of 11 U.S.C. §362(a)(1), (3), and (6). Therefore, the bankruptcy court issued an injunction under Section 105 of the Code, which specifically enjoined plaintiffs from prosecuting this lawsuit or any other legal action, other than an action before that bankruptcy court.

In particular, Judge Lifland deferred ruling on whether the inclusion of the bid procedure issue violates the automatic stay, but nonetheless enjoined plaintiffs from proceeding in the instant lawsuit on this claim because the ALPA Adversary Proceeding was to address this same issue. Eastern Air Lines v. Rolleston,

No. 90-5591A, slip op. at 18 (S.D. N.Y.,Mar.14, 1990)(Memorandum Decision on Motion for Determination of Automatic Stay Violated and for a Section 105 Injunction). Second, the court found that plaintiffs' claims regarding Eastern's alleged underfunding of the pension plan was a contingency and was untimely. Id. The Court found that plaintiffs' RICO, §1983 and RLA claims were attempts to control the assets of the bankrupt estate and therefore violated the automatic stay. Id. at 19-20. Next, the co urt found that the instant lawsuit interferes with essential core matters before the b ankruptcy court and interfers with Eastern's reorganization attempts. Id. at 22. Finally, the

court stated that "plaintiffs are merely asserting unliquidated, contingent pre-petition claims..." Id. at 21. Thus, the court concluded that the entire lawsuit now pending before this Court must be enjoined. Id. at 28.

Defendants contend that because the present action was filed in violation of the automatic stay provisions of Chapter 11, that the action is void and should be dismissed. Plaintiffs, on the other hand, assert that these causes of action are post-petition, are non-core proceedings, are based on the common law, and in any event, should not be dismisse, but instead should be stayed until the completion of the bankruptcy proceeding.

The Court will consider dismissal of the action under Fed. R.

Civ. P. 12 (b) (1) and (6), for lack of subject matter jurisdiction, and for failure to state a claim upon which relief can be granted.

II. FAILURE TO STATE A CLAIM

First, the Court will address whether defendants are entitled to relief on the basis that plaintiff has failed to state a claim. This circuit follows the rule that any acts in violation of an automatic stay under Chapter 11, Title 11 §362, are void and without effect. Kalb v. Feuerstein, 308 U.S. 433, 433 (1940); In Re Albany Partners, Ltd., 749 F.2d 670, 675 (11th Circuit 1984); Borg-Warner Acceptance Corp v. Hall, 685 F.2d 1306, 1308 (11th Cir. 1982). Thus, the first issue to be addressed is whether the automatic stay was

violated.

In Borg-Warner, the court stated that a violation of the automatic stay would occur if the plaintiff attempted to exercise self-help, repossession, or detinue under state court proceedings. 685 F2d at 1308. Further, in InRe State Airlines, 873 F2d 264 (11thCir.1989), where an airline plaintiff filed for bankruptcy under Chapter 11 of the Code, thereupon triggering the automatic stay provision, and the defendant filed suit against the airline in District Court the following day, the Court concluded that "the initiation of [the] lawsuit against the debtor [was] prohibited by the automatic stay." 873 F2d 264, 265 n.1 (11th Cir.1989).

Applying these rules to the present case results in a like

conclusion. Plaintiffs filed this suit after the automatic stay took effect. Thus, the suit would be a violation of the automatic stay provision of the Code, unless it was outside the parameters of that provision.

To determine the scope of the automatic stay provision, consideration must be given to the Order of the Bankruptcy court, which previously decided this question. This Court agrees with the reasoning and conclusions of the bankruptcy court regarding the applicability of the automatic stay to the current actions. Furthermore, because the bankruptcy court already litigated and determined that the instant case falls within the scope of the

automatic stay, that issue is foreclosed from relitigation by principles of res judicata. I.A. Durbin, Inc. v. Jefferson Nat'l Bank, 793 F2d 1541, 1549 (11th Cir. 1986). The fact that the decision has been appealed does not affect the applicability of res judicata principles. Fidelity standard Life Ins. Co. vs. First Nat'l Bank & Trust Co., 510 F.2d 272, 273 (5th Cir.), cert.denied, 423 U.S. 864 (1975).

Thus, both the actions of instituting and continuing this lawsuit are in violation of the automatic stay. As such, the Court finds this suit void and without effect. In Re Albany Partlenrs, 749 F2d at 675. Because this action is void and is thus a nullity, and because any action of this Court in the perpetration of this lawsuit

would therefore also be void and without effect, this Court must dismiss this action.

Plaintiff argues that the automatic stay should, at the most, only temporarily stay the proceedings in this Court. The Court, however, finds this proposition to be incorrect.

As a general rule, courts may only stay proceedings that were properly brought in the first instance. For example, in Ellison v. Northwest Eng'g Co. 707 F2d 1310, 1310 (11th Cir. 1983), the district court granted defendant's motionf or summary judgment. After that decision, the parties appealed. Before or al argument, but after appellate briefs had been filed, the appellee filed bankruptcy under Chapter 11. The Court found that since the automatic

stay had gone into effect when the bankruptcy petition was filed, the court was prohibited from issuing an opinion until that matter was resolved, and thus stayed the proceedings in its court until that time. Id. See also Association of St. Croix Condo. Owners v. St. Croix Hotel, 682 F. 2d 446 (3d Cir. 1982) (During appeal from eviction order, party files bankruptcy, causing the court to stay proceedings before it in accordance with the automatic stay provision of Section 362.); Breaux v. Boution, 182 So. 2d 168, 170 (Ct.App.La 1966) (previously instituted action is not terminated by bankruptcy proceeding).

These cases are distinguishable from the present action because in the cases relied upon by the Court, the suit that

was stayed until the termination of the bankruptcy proceeding was instituted before the automatic stay took effect. The facts of the case ar bar differ regarding the relation of the order and timing of the civil suit to the automatic stay. Accordingly, this Court rejects plaintiffs' proposition that the proper course to follow is to stay the proceedings until the conclusion of the bankruptcy action.

III. LACK OF JURISDICTION

The next issue to be addressed is whether plaintiffs' commencement of this action, and the continuation of the action after the bankruptcy court's order regarding the automatic stay and the subsequent injunction as to these plaintiffs, should be dismissed for lack of jurisdiction. Plaintiffs argue that these claims are beyond the jurisdiction of the

bankruptcy court because they are non-core proceedings, post-petition action, common-law actions, or actions directed at funds not owned by Eastern. However, this Court finds that plaintiffs' argumetn is not only unpersuasive, but is also foreclosed by the Order of Judge Lifland and the subsequent Order of this Court, dated August 31, 1990, both of which concluded that the claims of plaintiff fell under the umbrella of protection of the automatic stay. I.A. Durbin, 793 F2d at 1549.

The Bankruptcy court has exclusive jurisdiction over competing claims to proeprty alleged to belong to the debtor. In Re Brown, 22 B.R. 844,850 (N.D.N.Y. 1982). Because the court previously determined that this suit is attempting to claim assets alleged

to belong to the bankrupt estate, this principle applies, causing exclusive jurisdiction over the proceeding to vest in the bankruptcy court.

Similarly, in Guardian Mtg. Investors v. Unofficial Noteholders, 607 F 2d 1020, 1024 (2d Cir. 1979), the court held that an action brought by the debtor against the committee in the district court, charging the committee with violations of the Securities Exchange Act of 1934, was within the exclusive jurisdiction of the bankruptcy court. Id. Consequently, the district court dismissed the complaint for lack of jurisdiction, noting how this principle was equally applicable where a party sues the debtor with danger of frustrating the debtor's reorganization efforts. Id.

The same reasoning applies to the case at bar. The bankruptcy court has exclusive jurisdiction over the assets of Eastern's estate, for the reasons asserted by Judge Lifland, which included the danger of frustrating Eastern's reorganization effort with the continuation of this lawsuit and the attempts through this lawsuit to freeze millions of dollars of Eastern's bankruptcy estate. Additionally, this Court finds that the claims of plaintiffs are within the scope of the automatic Stay. Accordingly the Court finds itself without jurisdiction to hear the present action. For this reason, the Court must dismiss plaintiffs pending action.

Because the Court is dismissing this action pursuant to Fed. R.

Civ. P. 12(b)(1) and (6), the dismissal is with prejudice. Additionally, because the Court dismisses this action, all other motions currently pending before this Court in this case are moot.

For the fore going reasons, this court GRANTS defendants' Motion to Dismiss with prejudice. Consequently, plaintiffs' Motion to certify as a Class Action, plaintffs' Motion to Enter Default Judgment, plaintiffs' Motion for Partial Summary Judgment, and defendants' Motion To Extend Time for Answer are all MOOT.

SO ORDERED, this 31st day of August, 1990.

/s/ Jack T. Camp

JACK T. CAMP
UNITED STATES DISTRICT JUDGE

Entered on Docket September 6,1990.

Supreme Court, U.S.
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ON PETITION FOR A WRIT OF CERTIORARI TO
THE ELEVENTH CIRCUIT COURT OF APPEALS

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should even entertain this petition given the fact that there is no final decision in this action.
2. Whether the United States Court of Appeals for the Eleventh Circuit erred in vacating the District Court's final judgment and all orders entered in the case subsequent to the filing of the Complaint and directing the District Court to transfer the case to the United States District Court for the Southern District of New York.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request this Court to deny the Petition for a Writ of Certiorari seeking review of the *per curiam* decision of the Eleventh Circuit Court of Appeals entered November 20, 1990. In that decision, the Eleventh Circuit concluded that all issues in this case are presently being litigated in the United States District Court for the Southern District of New York in a Chapter 11 bankruptcy proceeding involving Eastern Air Lines. Accordingly, the Eleventh Circuit ordered the case transferred to the Southern District of New York pursuant to 28 U.S.C. § 1404(a). That transfer has subsequently taken place and accordingly, all issues for which certiorari is now petitioned are presently pending before the District Court in the Southern District of New York.

The lengthy history that brought the Petitioners to this Court will be briefly outlined below. In summary, on March 29, 1990 the New York Bankruptcy court in which Eastern's reorganization proceedings were pending issued a

permanent injunction against these Petitioners and their attorney Moreton Rolleston from continuing to prosecute this action in the federal district court in Atlanta (The Georgia action). Petitioners appealed that permanent injunction to the United States District Court for the Southern District of New York but sought no stay of its enforcement. Instead, Petitioners blatantly disregarded the permanent injunction and continued to prosecute the Georgia action for which they were subsequently sanctioned by the New York court. The Georgia district court subsequently dismissed this case and Petitioners appealed to the Eleventh Circuit. The Eleventh Circuit, instead of affirming that dismissal, transferred the case to New York for the reasons identified above.

Respondents respectfully submit that Petitioners and their attorney have engaged in a consistent course of conduct in which they have wasted the time of the district court in Georgia, the time of the Eleventh Circuit Court of Appeals and respectfully, are now doing the same to this court. Petitioners and their attorney have ignored the terms of a prior permanent injunction, have been undaunted even in the face of judicial sanctions and have continued in that conduct with respect to the present petition for certiorari.

STATEMENT OF THE CASE

This action was filed in the United States District Court for the Northern District of Georgia on February 12, 1990 by attorney Rolleston. On March 5, 1990, Rolleston was informed that Eastern Airlines, Inc. ("Eastern") would file an adversary proceeding the following day in the New York bankruptcy court and would request a temporary restraining order prohibiting Petitioners from continuing with the Georgia action and requiring them to dismiss the Georgia action as violative of the automatic stay provisions of the Bankruptcy Code. 11 U.S.C. § 362. Petitioners refused to attend the hearing on the motion for a temporary restraining order or even to participate by telephone. The motion was granted on March 6, 1990. Petitioners were then ordered to show cause on March 14, 1990 why a preliminary injunction should not

issue. Copies of the Temporary Restraining Order and Show Cause Order were sent to Rolleston by overnight mail that same day.

On March 9, 1990, Rolleston wrote to the bankruptcy court stating that he had not received the Temporary Restraining Order and Show Cause Order until March 9 and therefore would not be able to respond to them as required by the court. Rolleston did not ask for an extension to prepare for the preliminary injunction hearing or for an adjournment of that hearing, which was held on March 14, 1990. Rolleston had notice of the preliminary injunction hearing but did not appear or file any pleadings prior to the issuance of the preliminary injunction. Eastern presented witnesses and a full evidentiary presentation in support of its request. Following the hearing, the bankruptcy court issued an Order and Memorandum Decision preliminarily enjoining Petitioners from pursuing the Georgia action.

At the March 14 hearing, the bankruptcy court declined to consolidate the hearing on the motion for preliminary injunction with the hearing on the permanent injunction. Instead, it scheduled a hearing for March 23, 1990 on the request for a permanent injunction, providing Rolleston with more time to appear and present a defense. Rolleston was given ample notice of the pending hearing: by hand-delivered letter on March 15, 1990; by telephone on March 22, 1990; and by another hand-delivered letter on March 22, 1990. Rolleston did not respond to the request for a permanent injunction or in any way contact the bankruptcy court in an attempt to protect his own rights or the rights of his clients. On March 29, 1990 the bankruptcy court permanently enjoined Petitioners and attorney Rolleston from continuing the prosecution of the Georgia action. Petitioners and attorney Rolleston were further ordered to discontinue the Georgia action.

Petitioners filed a Notice of Appeal from the permanent injunction on March 28, 1990 but did not seek to stay the injunction pending appeal. Instead, Petitioners filed a motion to dismiss the adversary proceeding in the bankruptcy court.

The grounds for this motion were that venue was improper in the New York court, that the bankruptcy court's permanent injunction was void because Petitioners did not receive notice of all of the hearings in the bankruptcy court and that the bankruptcy court improperly heard the merits of the permanent injunction action before their time for filing pleadings had run.

In a Memorandum Endorsement filed on April 24, 1990, the bankruptcy court denied the motion to dismiss, finding that the filing of the appeal divested the court of jurisdiction to determine the motion and the issue of venue. The court further found that the Petitioners waived any objections to venue by not raising that defense previously and that Petitioners had adequate notice of and opportunity to respond to all court proceedings and decisions.

The Petitioners ignored the permanent injunction and continued with the Georgia action. In fact, Petitioners went so far as to file a motion for partial summary judgment and a motion for default judgment in the Georgia action. They also filed a motion to preliminarily enjoin the enforcement of the automatic stay, which was denied by Order of the Georgia district court dated August 31, 1990, and a motion to stay the hearing on Eastern's claim for damages pursuant to 11 U.S.C. § 362(h) in the bankruptcy court, which was denied as moot by the Georgia court on September 27, 1990.

By Order dated August 31, 1990 and amended on September 27, 1990, the Georgia court dismissed with prejudice the action brought by Petitioners in Georgia, finding that all of the decisions by the New York court were *res judicata* on the case pending in the Georgia court and that the New York court's order requiring dismissal of the Georgia action should and must be enforced. An expedited appeal followed and, on November 20, 1990, the United States Court of Appeals for the Eleventh Circuit issued a *per curiam* decision which vacated the district court's final judgment and all orders entered in the case after the filing of the complaint and directed the district court to transfer the entire case to the

United States District Court for the Southern District of New York. That transfer has now been accomplished.

SUMMARY OF THE ARGUMENT

The claims raised by the Petitioners in the Georgia action are still pending in the New York court. Those issues that were raised in the Georgia action that have already been decided in the New York bankruptcy action are now being decided on appeal in the United States District Court for the Southern District of New York. The only decision made by the United States Court of Appeals for the Eleventh Circuit was to transfer this entire action to New York. Therefore, there is no final decision from which Petitioners are appealing and this Court should deny this Petition for Certiorari.

Furthermore, the Eleventh Circuit was fully justified in transferring this action to the New York court. The same or similar issues have already been decided or are now being litigated in that action. All of the parties are subject to the jurisdiction of that court in accordance with the Bankruptcy Code. The appropriate forum for hearing all of the issues raised by Petitioners is the Bankruptcy court because, pursuant to the Bankruptcy Code, claims against a bankrupt party must be filed in the bankruptcy action. Consolidating all of Petitioners' claims in one forum would be the most efficient and effective use of judicial and economic resources.

REASONS FOR DENYING THE PETITION

The only action taken by the Eleventh Circuit was to transfer this case to the New York court. This case has not been fully and finally decided, nor have any of the issues raised by Petitioners been determined by the Georgia courts. The only issue before this Court is whether the transfer of this action was proper. Federal case law is consistent in holding that an order transferring an action to a different federal court is not final for purposes of appellate review and therefore cannot be the basis for an appeal. *See United States Fire Ins. Co. v. American Fidelity Life Assur. Co.*, 787 F.2d 438 (8th

Cir. 1986); *Howard Electrical & Mechanical Co. v. Frank Briscoe Co.*, 754 F.2d 847 (9th Cir. 1985); *Nascone v. Spudnuts, Inc.*, 735 F.2d 763 (3d Cir. 1984); *Roofing & Sheet Metal Services, Inc. v. La Quinta Motor Inns*, 689 F.2d 982 (11th Cir. 1982). Petitioners may challenge the transfer after a full and final determination of their claims. Therefore, there is no final order for this court to review and the granting of certiorari would be inappropriate.

In their petition for certiorari, Petitioners completely ignore the real issue in this case. Instead of addressing whether this action should have been transferred to the New York District Court, Petitioners argue only that this Court should hear this case because there is a divergence of opinion in various circuits as to whether a bankruptcy court can conduct a jury trial. Extrapolating from the two pages in which Petitioners address the reasons they believe this Court should grant certiorari, it appears that Petitioners allege that the Eleventh Circuit should not have transferred this action to the Bankruptcy court because the Bankruptcy court may not be able to conduct a jury trial as Petitioners have requested. If this is the argument Petitioners attempt to make, it is bogus. As Petitioners point out, the Second Circuit has found that a bankruptcy court can conduct a jury trial in a core proceeding, such as this action. *See, In Re Ben Cooper, Inc.*, 896 F.2d 1394 (2d Circuit 1990), *cert. granted,* 110 S. Ct. 3269 (1990), *vacated* on jurisdictional grounds, 111 S. Ct. 425 (1990). Thus, Petitioners should have no concern over whether there is a divergence of opinions as to whether a bankruptcy court can conduct a jury trial. The interests of Petitioners in a jury trial are in no way impaired or affected by this asserted divergence. Petitioners are therefore not proper parties to raise this issue.

In any event, the decision by the appellate court to order the transfer of this action to the district court was appropriate. Under the Bankruptcy Code, 11 U.S.C. § 362, actions brought against parties filing bankruptcy petitions will be stayed until the bankruptcy proceeding has been resolved. Any claims for monies from the bankrupt estate should and

must be brought in the bankruptcy proceeding. 28 U.S.C. § 157. In this case, the claims brought by Petitioners involve payments by Eastern into pilot pension plans, alleged contracts between Eastern and Petitioner Tristani, alleged racketeering activity and discrimination by Eastern and several other alleged violations of duties by Eastern towards its pilots. The co-defendants are all related to Eastern in that they are or were upper level management of Eastern or hold an ownership interest in Eastern. The co-defendants may be brought into the bankruptcy proceeding or into the proceedings pending before the New York District Court in order to resolve all issues against all of the defendants simultaneously. 28 U.S.C. § 157.

In *Diamond Mortgage Corp.* v. *Sugar*, 20 BCD 1669 (7th Cir. Dec. 21, 1990), the Seventh Circuit explained that the Bankruptcy Act as amended was intended to give the bankruptcy courts broad jurisdiction over matters arising under Chapter 11 or related to Chapter 11 actions. In *Diamond*, the Seventh Circuit allowed the bankruptcy court to exercise jurisdiction over malpractice claims brought against former legal counsel for the bankrupt partners because the claims were related, if not core to, the pending bankruptcy action.

The claims in this case against the non-bankrupt co-defendants are core proceedings and are directly related to and inextricably intertwined with the claims against Eastern which must be brought in the bankruptcy proceeding. Thus, it is even clearer in this case than it was in *Diamond* that the New York court is the appropriate forum for this action. *See also* G. Treister, et. al., *Fundamentals of Bankruptcy Law* § 6.01(c)(2) (2d ed. 1988) (". . . there should be no legitimate questions about the legislative intent to vest the court with a complete, or pervasive, jurisdiction over all matters that have to do with a bankruptcy case or have any significant bearing upon it.").

Because the action could not be brought against Eastern outside of the bankruptcy proceedings, it is appropriate to consolidate these actions against all of the defendants in one place. In fact, the basic purpose of the Bankruptcy Code is to

mandate the adjudication of all creditor claims in a single forum, namely the bankruptcy court. *In Re S.I. Acquisition, Inc.*, 817 F.2d 1142 (5th Cir. 1987). This action provides a perfect example of a case that can best be resolved in the bankruptcy proceeding.

If a judgment were entered in favor of the Petitioners against any of the other defendants, there would then be an issue of whether Eastern would have to indemnify the co-defendant. For example, Eastern has a specific contract provision in its agreement with Frank Lorenzo that it will indemnify Lorenzo for any judgments arising against his interests in Eastern. The interests of the parties are so intertwined that Eastern can benefit from the automatic stay provisions only if proceedings against the co-defendants are bought simultaneously in the only forum in which such claims may be raised against Eastern — the bankruptcy proceedings in New York. *See A.H. Robins Co.* v. *Piccinin*, 788 F.2d 994, 1001 (4th Cir.) *cert. denied*, 479 U.S. 876 (1986). If allowed to proceed separately, the bankruptcy proceedings will provide less than the requisite complete relief for Eastern.

In addition, a finding of conspiracy by the co-defendants in a separate action could be extended to apply to Eastern and could collaterally estop Eastern from relitigating the issues after the stay is lifted. *See Lesser* v. *A-Z Associates (In Re Lion Capital Group)*, 44 Bankr. 690, 702-03 (S.D.N.Y. 1984). Thus, allowing a separate action in Georgia against the defendants other than Eastern would only complicate and multiply the number of lawsuits prosecuted by Petitioners. While such complications would provide Petitioners with more than one bite at the apple, which is the entire purpose for Petitioners' insistence on maintaining both the New York and the Georgia actions, it would not be an appropriate course of action for this Court to allow. The best possible resolution to the problems raised by the various claims and actions filed by Petitioners is to consolidate them in the one court which has jurisdiction over all of them and which already has knowledge and an understanding of the issues and circumstances surrounding the claims.

CONCLUSION

Because there was no final decision in this case for review by this Court and because this action was properly transferred by the Eleventh Circuit, the Writ of Certiorari should be denied.

Respectfully submitted,

SMITH, GAMBRELL & RUSSELL

By: _____
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that I have served directly the requisite number of copies of the foregoing Brief in Opposition on:

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This day of , 1991.

_____

David M. Brown

Supreme Court, U.S.
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OFFICE OF THE CLERK

(3)

No 90-1051

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

CAPTAIN J.P. TRISTANI, et al

Petitioners,

Vs.

EASTERN AIR LINES, INC., et al,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1.

Whether the post-petition status of the claims underlying this case require a core designation pursuant to 28 U.S.C. §157 even though the claims could exist independent of the Chapter 11 bankruptcy proceedings and are based solely on state law and on federal statutes other than the bnakruptcy statute.

2.

Whether parties are entitled to a jury trial in an Article III court when their claims are based on a tort injury and a breach of contract arising from state law and upon the Federal RICO Statute (Chapter 18 U.S.C.) and upon 1983 Discrimination Statute (42 U.S.C. §1983), all of which are independent of the Chapter 11 Bankruptcy Statute (Chapter 11 U.S.C.).

3.

Whether Eastern Air Lines should be required to fund the unfunded $281,540,000 of the pilots pension plan guaranteed by the Pension Benefits Guaranty Corporation.

4.

Whether Eleventh Circuit and/or Atlanta District Court has the authority to order th New York District Court to hear the appeal and/or try this case.

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Respondents.

REPLY TO BRIEF IN OPPOSITION

The rules of this Court emphasize "concise" so this Reply will be concisely stated.

We are entitled to a jury trial on the issues of common law tort and

breach of contract and federal statutes regarding RICO and 1983 Discrimination. We contend that the Bankruptcy Court can not conduct a jury trial of any of these issues. In cases cited in our brief, the Eighth and Tenth Circuits held that a Bankruptcy Court could not conduct jury trials. Eastern relies on In Re Ben Cooper, Inc. in which the Second Circuit held that a Bankruptcy Court could conduct a jury trial. A certiorari was granted in that case but was remanded without a decision on that question. However, the Eleventh Circuit held a Bankruptcy Court could conduct trial but was reversed by this Court in Granfianciera, 109 S.Ct.2782 (July 23, 1989). Therefore, we contend that under the only Supreme Court ruling on this subject, the New

York Bankruptcy Court can not try this case and for that reason, among others, the Eleventh Circuit was in error in transferring the case from Atlanta to New York.

The automatic stay provisions of 11 U.S.C. §362 exempts therefrom post petition claims and noncore proceedings. There is no doubt that all of the Tristani claims actually occurred after Eastern had filed for bankruptcy in March of 1989, except that the underfunding of the pension plan and the conversion of money withheld from the Tristani paychecks occurred before and after the bankruptcy filing. In addition, these causes of action were not core proceedings since they stem from common law and U.S. statutes other

than the bankruptcy statutes. We contend, therefore, that transferring the instant suit from Atlanta to New York was in error.

The Adversary Proceeding in the Bankruptcy Court is on appeal to the New York District Court. It involves some of the same issues but the grounds of the appeal include these additional matters:

(1) No personal jursidiction over the Tristani parties because they were not served with the Adversary Proceedings.

(2) Denial of due process because the Tristani parties had no notice of the hearings on temporary or permanent injunction.

(3) Denial of due process because the hearing on the merits of the permanent injunction took place before the expiration of the time in which Tristani parties and Rolleston were allowed for filing answers and responsive pleadings.

(4) Bankruptcy Court did not have jurisdiction of Eastern's petition in bankruptcy because Eastern's principal office was in Florida.

The history of the case set forth in Respondent's Brief In Opposition is distorted, incorrect and incomplete, by failing to inform this Court, among other things, as follows:

(1) That Eastern, in writing, by and through its attorney, agreed

to the appeal from the Atlanta District Court to the Eleventh Circuit

(2) That Judge Jack T. Camp of the Atlanta District Court issued his Order as described in our original brief on March 2nd and that Judge Lifland of the New York Bankruptcy Court issued his injunction on March 17th. We were confronted with two different orders.

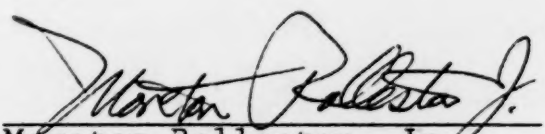
(3) That from February 11, 1990 when the original complaint was filed until July 1990, when Tristani moved for a default judgment, Eastern, Jet Capital, Texas Air and Lorenzo never filed an answer or other responsive pleadings. Under F.R.C.P. a motion to dismiss was not a responsive pleading.

(4) That Eastern Air Lines ceased operations on January 18, 1991 and the Trustee conducted an auction of most of the remaining assets on February 4 and 5, 1991.

(5) That the sanctions mentioned in Respondents' brief were granted under 11 USC 362(h) of the Bankruptcy Code but failed to mention the case of: In Re: Chateaugay Corporation, Reomar, Incorporated, The LTV Corporation, Et Al, Debtors, Maritime Asbestosis Legal Clinic v. LTV Steel Company, Inc., Et Al, docket 90-5032 in which the Second Circuit held in January 1991 that Section 362(h) "is applicable only to natural persons". Therefore, under that decision Judge Lifland's award of

sanctions is absolutely void.

(6) That on December 20, 1990 the Eleventh Circuit in Eastern Air Lines, Inc. v. Air Line Pilots Association International, Eastern Air Lines Master Executive Council, No. 90-5658, held that the striking Eastern pilots were entitled to be reinstated, in lieu of trainees, after November 22, 1989 when the pilots strike was terminated. Thus the employment contract of the pilots was upheld. This is the same contract which the Tristani plaintiffs originally alleged was breached by Eastern resulting in damages to the Plaintiffs.



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